60

763

2

SIPC

No. 06-571

FILED
JUN 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

MICHAEL A. WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether receiving a firearm in exchange for controlled substances constitutes use of the firearm during and in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1).

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 6
Argument:
Receiving a firearm in exchange for controlled substances constitutes use of the firearm during and in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1) 9
A. The text of Section 924(c)(1) encompasses receiving a firearm to close a drug deal 9
B. The meaning of "use" in Section 924(d) confirms that receiving a firearm in exchange for illegal drugs is proscribed by the "use" prong in Section 924(c)(1) 17
C. Construing the statute to proscribe receiving a firearm in exchange for drugs is consistent with the fundamental purpose of the statute 22
D. Because the ordinary tools of statutory construction make the meaning of Section 924(c)(1) clear, the rule of lenity has no application in this case 28
Conclusion 30
Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

Bailey v. *United States*, 516 U.S. 137 (1995) ..... *passim*
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) ... 28
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*., 511 U.S. 164 (1994) 26
Deal v. *United States*, 508 U.S. 129 (1993) 15
Dewsnup v. *Timm*, 502 U.S. 410 (1992) 20
Environmental Def. v. *Duke Energy Corp.*, 127 S. Ct. 1423 (2007) 20
Jacobson v. *United States*, 503 U.S. 540 (1992) 25
Jones v. *United States*, 529 U.S. 848 (2000) 15
McLaughlin v. *United States*, 476 U.S. 16 (1986) 24
Moskal v. *United States*, 498 U.S. 103 (1990) 29
Muscarello v. *United States*, 524 U.S. 125 (1998) 8, 22, 24, 29
Powerex Corp. v. *Reliant Energy Serv., Inc.*, 127 S. Ct. 2411 (2007) 20
Smith v. *United States*, 508 U.S. 223 (1993) ..... *passim*
Sorrells v. *United States*, 287 U.S. 435 (1932) 25
United States v. *Bass*, 404 U.S. 336 (1971) 28
United States v. *Cannon*, 88 F.3d 1495 (1996) ... 12, 18, 28
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 21
United States v. *Cotto*, 456 F.3d 25 (1st Cir. 2006), petition for cert. pending, No. 06-8168 (filed Dec. 5, 2006) 13, 14, 18, 22, 23
United States v. *Cox*, 324 F. 3d 77 (2d Cir.), cert. denied, 540 U.S. 854, and 540 U.S. 859 (2003) 14

Cases–Continued: Page

United States v. *Frederick*, 406 F.3d 754 (6th Cir. 2005) 13
United States v. *Harris*, 959 F.2d 246 (D.C. Cir. 1992), abrogated by *United States* v. *Stewart*, 246 F.3d 728 (D.C. Cir. 2001) 23, 28
United States v. *Harris*, 39 F.3d 1262 (4th Cir. 1994) ... 28
United States v. *Hornaday*, 392 F.3d 1306 (11th Cir. 2004), cert. denied, 545 U.S. 1134 (2005) 25
United States v. *Jimenez Recio*, 537 U.S. 270 (2003) 24
United States v. *Long*, 905 F.2d 1572 (D.C. Cir. 1980), cert. denied, 498 U.S. 948 (1990) 25
United States v. *Luke-Sanchez*, 483 F.3d 703 (10th Cir. 2007) 14
United States v. *Phelps*, 895 F.2d 1281 (9th Cir. 1990) 10, 23
United States v. *Price*, 76 F.3d 526 (7th Cir. 1996) 25
United States v. *Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997) 27
United States v. *Stewart*, 246 F.3d 728 (D.C. Cir. 2001) 16, 28
United States v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996), cert. denied, 520 U.S. 1157 (1997) 4, 5, 6, 13, 27
United States v. *Westmoreland*, 122 F.3d 431 (7th Cir. 1997) 16, 25, 28
United States v. *Woodruff*, 131 F.3d 1238 (7th Cir.), cert. denied, 524 U.S. 956 (1998) 28
United States v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994), cert. denied, 513 U.S. 880 (1994) 4, 5

Statutes and guidelines: Page

Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 26
18 U.S.C. 2 25
18 U.S.C. 922 ..... 2, 1a
18 U.S.C. 922(a)(1) 21
18 U.S.C. 922(a)(3) 17, 21
18 U.S.C. 922(g)(1) 2, 4
18 U.S.C. 922(j) 17, 20
18 U.S.C. 922(*l*) 21
18 U.S.C. 922(n) 21
18 U.S.C. 924 (2000 & Supp. IV 2004) 2, 21, 3a
18 U.S.C. 924(b) 21
18 U.S.C. 924(c) ..... *passim*
18 U.S.C. 924(c)(1) ..... *passim*
18 U.S.C. 924(c)(1)(A) 1
18 U.S.C. 924(d) ..... *passim*
18 U.S.C. 924(d)(1) 10, 17, 18, 19, 20
18 U.S.C. 924(d)(3) 10, 17, 18, 19, 20, 21
18 U.S.C. 924(d)(3)(C) 21
18 U.S.C. 924(d)(3)(E) 21
18 U.S.C. 2113(d) 24
United States Sentencing Guidelines (2004):
§ 2K2.4(c) 4
§ 4B1.1(c)(2) 4
§ 4B1.1(c)(3) 4

Miscellaneous: Page

Black's Law Dictionary (6th ed. 1990) 9
114 Cong. Rec. 22,231 (1968) 23
144 Cong. Rec. (1998):
p. 26,608 26
pp. 26,608-26,609 27
H.R. Rep. No. 344, 105th Cong., 1st Sess. (1997) 26
Webster's New International Dictionary (2d ed. 1939) 9

In the Supreme Court of the United States

No. 06-571

MICHAEL A. WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter*, but is reprinted in 191 Fed. Appx. 326.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2006. The petition for a writ of certiorari was filed on October 23, 2006, and was granted on February 26, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924(c)(1)(A) provides in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * *,

> uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime

be subject to specified penalties.[1]

The entirety of 18 U.S.C. 924 (2000 & Supp. IV 2004) and the pertinent part of 18 U.S.C. 922 are set forth in the appendix. App., *infra*, 1a-14a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Louisiana, petitioner was convicted of distributing oxycodone hydrochloride, in violation of 21 U.S.C. 841(a)(1); using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and unlawfully possessing firearms as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a. He was sentenced to a total of 262 months of imprisonment. *Id.* at 6a. The court of appeals affirmed. *Id.* at 1a-2a.

1. As stipulated in the plea agreement (Pet. App. 7a-11a), in November 2004, law enforcement agents, assisted by a confidential informant, were investigating petitioner's drug trafficking and firearm activities. *Id.* at 8a-9a. Petitioner previously had been convicted of two state felony offenses for distribution of cocaine. *Id.* at 11a. Petitioner told the informant that he wished to purchase a firearm to protect himself against robbers. *Id.* at 9a. When petitioner asked the informant how much the firearm would cost, the informant replied that he did not know, but that the firearm dealer would be

---

[1] Only the "use" provision is directly at issue here. Petitioner was not indicted under the "carry" or "possession" prongs of the statute. J.A. 7-8.

willing to exchange a firearm for drugs. *Ibid.* Petitioner advised the informant that he would be willing to trade drugs for the firearm. *Ibid.*

Subsequently, the informant told petitioner that he had an Israeli Military Industries Desert Eagle pistol available to exchange for drugs. Pet. App. 9a. On the day of the transaction, the informant and an undercover agent met petitioner outside petitioner's residence, and petitioner exchanged twenty-four dosage units of oxycodone hydrochloride, also known as OxyContin, for a Desert Eagle .50 caliber pistol. *Ibid.* After the exchange, law enforcement agents apprehended petitioner and found the Desert Eagle pistol in his vehicle. *Ibid.*

Law enforcement officers found additional firearms and controlled substances in a subsequent search of petitioner's residence. Pet. App. 9a-10a. Among the items found were approximately 18 dosage units of oxycodone (OxyContin), 29 tablets of alprazolam (Xanax), 30 tablets of hydrocodone (Lorcet), and a scale. *Id.* at 9a. They also located two Ruger semi-automatic rifles, a Winchester single-shot rifle, a Winchester single-shotgun, and a Bryco semiautomatic pistol, along with approximately 700 rounds of ammunition of various types. *Id.* at 9a-10a.

Petitioner informed the law enforcement officers that he had prescriptions for the controlled substances, and that he had sold some of his prescribed drugs on a number of occasions to raise cash. Pet. App. 10a. Petitioner admitted to agents that he had two previous state felony cocaine distribution convictions. *Id.* at 10a-11a. He also told the agents that, in addition to the firearms found in the search, he had a Colt .45 caliber semiautomatic pistol and a Glock 9 mm. semiautomatic pistol that had

been stolen from his residence. *Id.* at 10a. He further admitted that he purchased the Desert Eagle semiautomatic pistol "to protect his other firearms and drugs from robbery and theft." *Id.* at 10a-11a.

2. A grand jury in the United States District Court for the Middle District of Louisiana returned a three-count indictment charging petitioner with distributing oxycodone hydrochloride, in violation of 21 U.S.C. 841(a)(1); using a firearm during and in relation to that drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and unlawfully possessing as a convicted felon the firearms located in his residence, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a; J.A. 7-9. Petitioner entered a conditional guilty plea based on stipulated facts, retaining his right to challenge the sufficiency of the factual basis underlying his conviction under Section 924(c)(1). Pet. App. 7a-11a; J.A. 18-20. Petitioner was sentenced to a total of 262 months of imprisonment. Pet. App. 6a. His advisory Guidelines range of 262 to 327 months was based on his career offender status and the Section 924(c)(1) conviction, and his sentence included a 60-month consecutive term for the violation of Section 924(c)(1). *Ibid.*; Presentence Investigation Report para. 21; *id.* para. 48 (citing Sentencing Guidelines §§ 2K2.4(c), 4B1.1(c)(2) and (3) (2004)).

3. The court of appeals affirmed. Pet. App. 1a-2a. The court held that petitioner's receiving of a handgun in exchange for drugs constituted use of that firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). Pet. App. 1a-2a. In so doing, the court relied on its decisions in *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir.), cert. denied, 513 U.S. 880 (1994), and *United States* v. *Ulloa*, 94 F.3d 949 (5th

Cir. 1996), cert. denied, 520 U.S. 1157 (1997). Pet. App. 2a.

In *Zuniga*, the Fifth Circuit upheld the Section 924(c)(1) conviction of a defendant who traded drugs for a firearm. The court of appeals decided *Zuniga* shortly after this Court held in *Smith* v. *United States*, 508 U.S. 223 (1993), in the context of a guns-for-drugs trade, that use of a firearm "as an item of barter or commerce" falls within the plain language of Section 924(c)(1), as long as the use occurs during and in relation to a drug trafficking offense. *Id.* at 237. The Fifth Circuit concluded in *Zuniga* that *Smith* was not "distinguishable on the basis that * * * the defendant owned the drugs and was bartering them for the firearms, while in *Smith* the defendant owned the firearm and was bartering it for the drugs." *Zuniga*, 18 F.3d at 1259. The court reasoned that, in either case, "the presence of the firearms was not incidental, but rather an essential part of the negotiations." *Ibid.*

The Fifth Circuit reaffirmed *Zuniga* after this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). In *Bailey*, this Court construed "use" in Section 924(c)(1) as "requir[ing] evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.* at 143. In *Ulloa*, the Fifth Circuit held that, "by bartering drugs for firearms, [the defendant] 'used' the firearms because, under one of *Bailey*'s definitions of 'use', [the defendant] 'carr[ied] out a purpose or action by means of' them." *Ulloa*, 94 F.3d at 956 (quoting *Bailey*, 516 U.S. at 145) (last bracket in original; internal citations omitted). The *Ulloa* court reasoned that, by requiring that "he be furnished firearms in exchange for his drugs," a defendant "ac-

tively employ[s]" the firearms and thus "use[s]" them within the meaning of Section 924(c)(1). *Ibid.*

Here, the court of appeals rejected petitioner's attempt to distinguish *Zuniga* and *Ulloa*. The court concluded that the factors cited by petitioner—that government agents first proposed trading drugs for the handgun, that petitioner controlled the handgun for only moments before his arrest, and that he could not have used the handgun because it was unloaded—were not material to the determination of "use" under Section 924(c)(1). Pet. App. 2a.

SUMMARY OF ARGUMENT

An individual who receives a firearm in exchange for drugs uses the firearm during and in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1). That conclusion follows directly from the text, structure, and purpose of the statute.

A. The plain language of the "use" prong of Section 924(c)(1), as construed by this Court, encompasses the conduct at issue here.

In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court held that "use" in Section 924(c)(1) encompasses not only use of a firearm as a weapon, but also use of a firearm as an item of barter or commerce. The Court based that conclusion on the ordinary meaning of the word "use," as well as the structure and purpose of Section 924. The Court reaffirmed *Smith* in *Bailey* v. *United States*, 516 U.S. 137 (1995). In that case, the Court held that "use" in Section 924(c)(1) requires that the defendant actively employ the firearm, such that he make the firearm an operative factor in relation to the drug trafficking crime. The *Bailey* Court made clear

that its active-employment understanding of use encompasses bartering.

Under the plain text of Section 924(c)(1), as construed in *Bailey* and *Smith*, an individual who trades illegal drugs for a firearm uses that firearm during and in relation to a drug trafficking crime. First, by accepting the firearm as consideration to effectuate his drug sale, the drug dealer "uses" the firearm in precisely the same manner as the defendant in *Smith*: as an item of barter or commerce. Second, in so doing, the drug dealer actively employs the firearm during and in relation to a drug trafficking crime. In a drugs-for-guns barter, there is nothing passive about the drug dealer's receipt of the firearm. It is the sine qua non of the transaction. The dealer uses the firearm as a means to carry out a purpose or action, namely, to seal his drug deal.

B. The conclusion that "use" in Section 924(c)(1) encompasses receipt of a firearm as an item of commerce is compelled by the meaning of "use" in the integrally related forfeiture provision in 18 U.S.C. 924(d). As this Court held in *Smith*, and reiterated in *Bailey*, "use" must have the same meaning in Section 924(c)(1) as it does in Section 924(d). Section 924(d) provides for the forfeiture of firearms "intended to be used" in various offenses, including ones in which the firearm is received as an item of barter or commerce. Significantly, this Court relied on these same provisions in *Smith* to conclude that "use" in Section 924(d), and therefore "use" in Section 924(c)(1), encompasses use of a firearm as an item of barter or commerce. Section 924(d) thus makes clear that Congress contemplated that a firearm can be "used" when it is received as an item of commerce.

C. The purpose of the statute confirms that petitioner's conduct amounts to "use" in violation of the statute. Petitioner, a convicted drug dealer, initiated the request for a firearm, and then agreed to provide drugs to obtain it. By contributing to the introduction of the firearm into the transaction, petitioner caused the very harm that Congress sought to avoid in enacting Section 924(c)(1). Regardless of which side of the guns-for-drugs barter a defendant is on, the firearm's presence—and its integral role in the illegal drug deal—causes the risk to society that Congress sought to prevent.

D. The rule of lenity has no application here. That rule comes into play only when, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). There is no need to make such a guess here. A drug dealer who takes a firearm in order to close a drug deal—no less than one who offers the firearm—uses the firearm during and in relation to a drug trafficking crime under the plain text of Section 924(c)(1), as construed by this Court in *Smith* and *Bailey*.

ARGUMENT

RECEIVING A FIREARM IN EXCHANGE FOR CONTROLLED SUBSTANCES CONSTITUTES USE OF THE FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING CRIME WITHIN THE MEANING OF 18 U.S.C. 924(c)(1)

A. The Text Of Section 924(c)(1) Encompasses Receiving A Firearm To Close A Drug Deal

An individual who accepts a firearm as the consideration for the sale of his drugs uses the firearm as an item of barter or commerce. Moreover, that person actively employs the firearm during and in relation to a drug trafficking crime by taking the firearm as a necessary part of closing his drug deal. Accordingly, receiving a gun in exchange for controlled substances falls squarely within the text of Section 924(c)(1) as construed by this Court in *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995).

1. In *Smith*, the Court held that a defendant who trades his firearm for drugs uses it during and in relation to a drug trafficking offense within the plain language of Section 924(c)(1). The Court rejected the view that the scope of the provision was limited to using a firearm "*as a weapon*," recognizing that Section 924(c)(1)'s language "sweeps broadly." 508 U.S. at 229. The Court observed that the ordinary meaning of the verb "use" includes "[t]o convert to one's service," "to employ," "to avail oneself of," and "to carry out a purpose or action by means of." *Ibid.* (quoting *Webster's New International Dictionary* 2806 (2d ed. 1939); *Black's Law Dictionary* 1541 (6th ed. 1990)); accord *Bailey*, 516 U.S. at 145. Based on that common under-

standing of "use," as well as the structure of Section 924(c)(1), the Court concluded that "Congress employed the term 'use' expansively, covering both use as a weapon * * * and use as an item of trade or barter." *Smith*, 508 U.S. at 236.

In so doing, the Court looked to the meaning of "use" in Section 924(d). *Smith*, 508 U.S. at 235. The Court noted (*id.* at 234) that under Section 924(d)(1), any firearm or ammunition "intended to be used" in various offenses referenced in Section 924(d)(3) is subject to seizure and forfeiture. See 18 U.S.C. 924(d)(1) and (3). Because those offenses include offenses in which the firearm is used "as an item of barter or commerce," not just offenses where it is used as an offensive weapon, the Court held that the meaning of "use" in Section 924(c)(1) must also encompass use of a firearm as an item of barter or commerce. *Smith*, 508 U.S. at 234.

The Court further concluded that "[t]he phrase 'in relation to' is expansive." *Smith*, 508 U.S. at 237. Although the Court did not determine "the precise contours" of that requirement, it held that the gun bartered in *Smith* met "any reasonable construction of it." *Id.* at 238. The Court reasoned that the bartered gun did far more than merely facilitate the drug trafficking crime; rather, "the gun . . . was an integral part of the transaction." *Ibid.* (quoting *United States* v. *Phelps*, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc)). As the Court explained, "[w]ithout it, the deal would not have been possible." *Ibid.*

The Court further explained that its construction of Section 924(c)(1)'s "use" prohibition was consistent with Congress's purpose, noting that Congress "was no doubt aware that drugs and guns are a dangerous combina-

tion." *Smith*, 508 U.S. at 240. The Court "[saw] no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity." *Ibid.* Accordingly, the Court concluded that use of a firearm "as an item of barter fall[s] within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense." *Ibid.*

The Court reaffirmed *Smith* in *Bailey, supra.* *Bailey* held that "use" of a firearm in Section 924(c)(1) means "an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 516 U.S. at 143. Referring to the dictionary definitions consulted in *Smith*, the Court observed that these various definitions "imply action and implementation." *Id.* at 145. The Court thus rejected a "proximity and accessibility standard" for evaluating whether a firearm had been "use[d]" within the meaning of Section 924(c)(1), because, in the Court's view, "nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard." *Id.* at 144. Applying its "active employment" standard, the Court concluded that the evidence in the consolidated cases in *Bailey*—one involving "a firearm inside a bag in [a] locked car trunk," and the other involving an "unloaded, holstered firearm * * * locked in a footlocker in a bedroom closet"—was insufficient. *Id.* at 151.

In so holding, the *Bailey* Court made clear that its decision was "not inconsistent with *Smith*." *Bailey*, 516 U.S. at 148. The Court observed that "use" encompasses "use as an item of barter," and that the "active-

employment understanding of 'use' certainly includes," *inter alia*, "bartering." *Ibid.* When a firearm is used as an item of barter it does not sit on the sidelines, but plays an active role in the trafficking. Likewise, the use of a firearm in bartering is obviously distinct from simple possession.

2. Under the plain text of Section 924(c)(1), as construed in *Smith* and *Bailey*, petitioner used a firearm during and in relation to a drug trafficking crime. First, a drug dealer who accepts a firearm as consideration for his drugs uses the firearm in the very manner recognized as a "use" by *Smith*: "as an item of barter or commerce." *Smith*, 508 U.S. at 237. The fact that *Smith* involved a defendant trading a gun for drugs, and not vice versa, is "a distinction without a difference." *United States* v. *Cannon*, 88 F.3d 1495, 1509 (8th Cir. 1996). The holding in *Smith* was not that using a firearm to obtain drugs is "use" within the meaning of Section 924(c)(1). The holding was a broader one: that using a firearm as an item of trade or commerce in a drug transaction falls within the plain meaning of the text of the statute. *Smith*, 508 U.S. at 237; accord *Bailey*, 516 U.S. at 148 (observing that the question in *Smith* was whether a "particular use (bartering) came within the meaning of § 924(c)(1)"). Just like the defendant in *Smith*, a drug dealer who takes a firearm in exchange for drugs uses the firearm as an item of commerce in the illegal marketplace. After *Smith*, there can be no doubt that such a "use" is captured by the statute.

Second, a drug dealer who takes a firearm in order to close a drug deal actively employs that firearm as required by *Bailey*. Petitioner contends that his conduct was "[s]imple receipt" of a gun, which he describes as a "quintessentially passive event" in which he "[did]

nothing more than take possession of an object." Br. 9; *id.* at 10-11 (describing his conduct as "mere receipt" of a firearm). But that characterization—which likens petitioner's role to that of a donation box receiving a contribution—ignores the fundamental nature of bartering. As the First Circuit has explained, just because petitioner "received guns does not mean he was passive with respect to them." *United States* v. *Cotto*, 456 F.3d 25, 29 (1st Cir. 2006), petition for cert. pending, No. 06-8168 (filed Dec. 5, 2006). The drug dealer's taking of a firearm in exchange for illegal drugs is not a passive event that happens after the transaction is completed; it *is* the transaction. Taking the gun is part and parcel of an agreed-to exchange—an active act of using the firearm as an item of commerce.

That use fits squarely within the ordinary definitions of "use" relied on by *Bailey* and *Smith*. See *Bailey*, 516 U.S. at 145 (quoting *Smith*, 508 U.S. at 229). The drug dealer uses the firearm as a means to "carry out a purpose or action," namely, to close his drug deal. See *United States* v. *Ulloa*, 94 F.3d 949, 956 (5th Cir. 1996) ("[B]y bartering drugs for firearms, [the defendant] 'used' the firearms because, under one of *Bailey*'s definitions of 'use', [the defendant] 'carr[ied] out a purpose or action by means of' them.") (last set of brackets in original), cert. denied, 520 U.S. 1157 (1997). If the owner of the gun does not proffer the firearm, or if the drug dealer does not take it in exchange for a particular amount of drugs, the illegal drug transaction would not occur. Just as in *Smith*, "[w]ithout it, the deal would not [be] possible." 508 U.S. at 238.[2]

---

[2] Cf. *United States* v. *Frederick*, 406 F.3d 754, 764 (6th Cir. 2005) (stating, in a possession-in-furtherance case, that "a defendant's willing-

Under *Bailey*, a defendant who "makes the firearm an operative factor in relation to the predicate offense" satisfies the "active employment" understanding of use. 516 U.S. at 143. Petitioner disputes (Br. 35-39) that *his conduct* with respect to the firearm (as opposed to that of those offering the gun) made it an operative factor. But in such a drugs-for-guns trade, both sides actively employ the firearm. When a drug dealer "accept[s] the gun[] as a way of 'clos[ing] the drug transaction," he "mak[es] the gun an operative factor in the drug trafficking crime." *Cotto*, 456 F.3d at 29 (last two pairs of brackets in original) (quoting *United States* v. *Cox*, 324 F.3d 77, 84 (2d Cir.), cert. denied, 540 U.S. 854, and 540 U.S. 859 (2003)). That conduct is at least as active, with respect to the underlying drug transaction, as displaying a firearm during such a transaction (which petitioner concedes falls within the text of the statute, see Br. 35-36).

Indeed, in *Bailey*, the Court indicated that an offender's mere reference to a firearm in his possession could amount to "active employment," if the reference were "calculated to bring about a change in the circumstances of the predicate offense." *Bailey*, 516 U.S. at 148. Here, the firearm did not merely bring about a change in the circumstances of petitioner's drug distribution; it was an integral part of the drug offense. That is a far cry from the "mere possession" of locked-away weapons that the Court found insufficiently active in

---

ness to accept possession of a gun as consideration for some drugs he wishes to sell *does* 'promote or facilitate' that illegal sale," and that "[i]f the defendant did not accept possession of the gun, and instead insisted on being paid fully in cash for his drugs, some drug sales—and therefore some drug trafficking crimes—would not take place"); accord *United States* v. *Luke-Sanchez*, 483 F.3d 703, 706 (10th Cir. 2007).

Bailey. See *id.* at 143. Nor does applying Section 924(c)(1) in the circumstances here improperly stretch the statute to "cover a firearm that played no detectable role in the crime's commission." See *id.* at 147.[3]

Contrary to petitioner's contention (Br. 30-35), *Bailey* did not suggest, in reaffirming *Smith*, that the defendant must be the one offering up or bartering "with" the firearm to satisfy *Bailey*'s "active employment" requirement. To the contrary, *Bailey* expressly stated that "[t]he active-employment understanding of 'use' certainly includes brandishing, displaying, *bartering*, striking with, and, most obviously, firing or attempting to fire a firearm." 516 U.S. at 148 (emphasis added). Notably, in contrast to "striking with," *Bailey* did not limit "bartering * * * a firearm" to "bartering with." But even assuming that the *Bailey* Court had in mind only bartering with a firearm, it is not clear that that phrase is limited to the offeror and, in any event, a defendant who takes a firearm in exchange for illegal drugs actively employs the firearm in the relevant sense.

That conclusion is made even more clear by considering the remainder of the "use" prohibition in Section 924(c)(1). As this Court has repeatedly explained, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United*

---

[3] Nor does this Court's decision in *Jones* v. *United States*, 529 U.S. 848 (2000), which held that a private residence is not a building "used in" interstate commerce, advance petitioner's cause. See Br. 18. Unlike a person who trades drugs in exchange for a gun, a building cannot be an active participant in a transaction, and, in any event, *Jones* did not involve an effort to exchange a private home as part of the relevant transaction.

States, 508 U.S. 129, 131-132 (1993); *Smith*, 508 U.S. at 229. Here, the question is not whether taking a firearm in exchange for drugs is use of the firearm in the abstract, but whether it involves the use of a firearm "during and in relation to any * * * drug trafficking crime." 18 U.S.C. 924(c)(1). And where, as here, someone accepts a firearm to close a drug deal, that person clearly has used the firearm during and in relation to a drug trafficking crime in the ordinary sense of those words.

For the same reason, the hypothetical examples on which petitioner relies miss the mark. See Br. 11-12 (citing *United States* v. *Westmoreland*, 122 F.3d 431, 435-436 (7th Cir. 1997); *United States* v. *Stewart*, 246 F.3d 728, 730-731 (D.C. Cir. 2001)). While it may not be natural for a customer who pays a cashier a dollar for a cup of coffee in the courthouse cafeteria to say that he has thereby "used the coffee," that hypothetical strips the question of "use" out of the context contained in the statute. Section 924(c)(1) asks whether the use occurs "during and in relation to * * * [a] drug trafficking crime." One does not usually discuss whether one has used a cup of coffee as an item of commerce during and in relation to a beverage transaction. But, if one did, it would be clear that one uses the coffee in, and as integral to, the beverage transaction. Here, the moment the recipient takes possession of the firearm in exchange for the drugs, he uses it to complete the drug trafficking crime. In addition, both of petitioner's hypotheticals are exchanges involving money—the universal medium of exchange—rather than a true barter. They therefore do not capture the give-and-take character of any bartering transaction, in which each bartered item is central to the

transaction, with each party to the exchange using both bartered items as a way to close the transaction.

B. The Meaning Of "Use" In Section 924(d) Confirms That Receiving A Firearm In Exchange For Illegal Drugs Is Proscribed By The "Use" Prong In Section 924(c)(1)

Based on the well-established principle that neither a single word nor a single provision of a statute can be read in isolation, *Smith*, 508 U.S. at 233, this Court concluded in both *Bailey* and *Smith* that "'using a firearm' should not have a 'different meaning in § 924(c)(1) than it does in § 924(d).'" *Bailey*, 516 U.S. at 146 (quoting *Smith*, 508 U.S. at 235). Because "use" of a firearm in Section 924(d) encompasses "receipt" of a firearm as an item of commerce, "use" in Section 924(c) must be so construed as well.

1. In *Smith*, the Court concluded that, because provisions in Section 924(d)(1) and (d)(3) require the forfeiture of firearms "intended to be used" in various offenses, and those offenses include ones where the firearm is used as an item of barter or commerce, "use" in Section 924(c) must also encompass use of a firearm as an item of barter or commerce. 508 U.S. at 234. Significantly, the *Smith* Court's examples from Section 924(d) include offenses where the use of the firearm as an item of commerce is *receipt* of a firearm.[4] These provisions

[4] Those offenses include "unlicensed receipt of a weapon from outside the State," in violation of 18 U.S.C. 922(a)(3); "receipt of stolen firearms," in violation of 18 U.S.C. 922(j); and "shipment or receipt of a firearm with intent to commit a felony," in violation of 18 U.S.C. 924(b). *Smith*, 508 U.S. at 234 & n.*. In addition, as the First Circuit has observed, Section 924(d)(3) references several other offenses consisting of receipt of a firearm as an item of commerce, including "those described in 18 U.S.C. § 922(a)(1)(A) (unlicensed importing, dealing in, or receiving firearms), * * * § 922(*l*) (importation of firearms or re-

make clear that, "under § 924(d), a gun can be 'used' in an offense consisting of receipt of the gun," because any firearm that is "intended to be used" to violate these receipt offenses is subject to forfeiture. *Cotto*, 456 F.3d at 29. Thus, for example, Section 924(d) contemplates that "one 'uses' a firearm under § 924(d)(1) when one 'receives' a firearm in violation of § 922(a)(3)," which prohibits the unlicensed receipt of a weapon from out-of-state. *Cannon*, 88 F.3d at 1509.

The word "use" must be given the same meaning in Section 924(c)(1). See *Bailey*, 516 U.S. at 146; *Smith*, 508 U.S. at 235. In each of the examples from Section 924(d)(3) above, the intended "use" that subjects the firearm to forfeiture is no different in character from the "use" at issue here. By receiving the firearm in a barter for drugs, petitioner used the firearm every bit as much as a defendant who receives an unlicensed firearm from out-of-state.

2. Despite the text of Section 924(d)(1) and (d)(3), petitioner contends (Br. 24-25) that "use" in Section 924(c) does not sweep as broadly. He notes (*id.* at 25) that Section 924(d)(1) calls for forfeiture of firearms and ammunition "intended to be used" in the offenses referenced in Section 924(d)(3), rather than "used" in such offenses as required by Section 924(c)(1). Although the Court recognized that distinction in *Bailey*, the distinction has no force in this context. In *Bailey*, the Court distinguished between current uses and prospective uses, noting that the language of Section 924(d) "provided for forfeiture of a weapon even before it had been 'used.'" In that respect, the *Bailey* Court concluded

---

ceipt of imported firearms), [and] § 922(n) (receipt of firearm by person under indictment)." *Cotto*, 456 F.3d at 29 n.4.

that Section 924(d) swept more broadly than Section 924(c), which proscribed only "actual use." *Bailey*, 516 U.S. at 146.

But there is no dispute here that petitioner actually received the firearm; the question is whether the meaning of "use" of a firearm in Section 924(c)(1) is broad enough to encompass "receipt" of a firearm during a bartering transaction. Section 924(d)(1) and (d)(3) confirm that it is. By calling for forfeiture of a firearm that is "intended to be used" in specific offenses—including certain receipt offenses—Congress plainly understood that the firearm could at some point be "used" in such an offense simply by being received as an item of commerce. The fact that for purposes of Section 924(d) the "use" need not have yet occurred does not detract from the conclusion that Section 924(d) makes clear that receipt is a qualifying use. And the fact that such "receipt" of a firearm falls within the meaning of "use" in Section 924(d) compels the conclusion that "receipt" as an item of barter or commerce also falls within the meaning of "use" in Section 924(c)(1). That was the logic of the Court's conclusion in *Smith*, see 508 U.S. at 234-235, and that logic is equally forceful here.

In addition, petitioner relies (Br. 23-24) on the fact that Section 924(d)(1) also provides for forfeiture of firearms "involved in or used in" a broad range of offenses and violations. 18 U.S.C. 924(d)(1). But petitioner is wrong to suggest that because that particular phrase captures more than use of a firearm, "use" in Section 924(d) does not encompass receipt of a firearm as an item of commerce. The important point here is that, with respect to the receipt offenses in Section 924(d)(3), Congress called for forfeiture of the firearms in narrower circumstances, namely, where they were "in-

tended to be used" in those offenses. See 18 U.S.C. 924(d)(1) (subjecting to seizure or forfeiture "any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection"). In so doing, Congress demonstrated its view that one uses a firearm by receiving it as an item of barter or commerce and that it did not need to employ the broader "involved in" language in order to capture such conduct.[5]

3. Nor does the fact that some provisions in the United States Code employ the term "receive" (see Pet. Br. 19-22) to criminalize certain firearm-related conduct undermine the conclusion that "use" in Section 924(c)(1) encompasses receipt of a firearm in a drugs-for-guns trade. The most relevant provision for interpreting the meaning of "use" in Section 924(c) is Section 924(d). "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007), and "[t]hat rule must surely apply, *a fortiori*, to use of identical words *in the same section of the same enactment*." *Dewsnup* v. *Timm*, 502 U.S. 410, 422 (1992) (Scalia, J., dissenting). Although these principles are not "irrebuttable," *Environmental Def.* v. *Duke Energy Corp.*, 127 S. Ct. 1423, 1432 (2007), there is no need

[5] It is true that several of the receipt offenses listed in Section 924(d)(3) also are swept in by other provisions of Section 924(d) to which the "involved in or used in" language applies. See, *e.g.*, 18 U.S.C. 924(d)(1) (listing Section 922(j) as one such offense). But the fact that Congress has overlapping forfeiture provisions with respect to certain (but not all) of the receipt offenses takes nothing away from the fact that, in the text referring to the Section 924(d)(3) offenses, Congress saw no need to "expand the language for offenses in which firearms were 'intended to be used,'" even though receipt of a firearm constituted the offense. See *Smith*, 508 U.S. at 235.

to resort to general principles here, because this Court already has held that "use" in Section 924(c) has the same meaning as "use" in Section 924(d). See *Bailey*, 516 U.S. at 507; *Smith*, 508 U.S. at 235. Given that "use" as employed by Congress in Section 924 encompasses "receipt" of a firearm as an item of commerce, it was not necessary for Congress to employ the term "receive" in Section 924(c)(1) in order to reach petitioner's bartering conduct. Indeed, more than half of the firearm-receipt provisions to which petitioner points are ones referenced in Section 924(d)(3), which (as discussed above) are encompassed by Congress's understanding of "use" in Section 924(d). Compare Pet. Br. 20 (citing 18 U.S.C. 922(a)(1), 922(a)(3), 922(*l*), 922(n), and 924(b)), with 18 U.S.C. 924(d)(3)(C) and (E) (referencing, *inter alia*, those provisions). That fact makes clear that the term use in Section 924 *includes*, rather than excludes or distinguishes, receipt.

Moreover, the fact that Congress has employed both "use" and "receive" in the disjunctive in various other statutory provisions does not mean that the word "use" in Section 924(c)(1) excludes taking a firearm in exchange for illegal drugs. See Pet. Br. 20-21 (citing statutes criminalizing, *inter alia*, receipt or use of the virus that causes smallpox). Even assuming that "use" in those other statutes is mutually exclusive of "receipt," this Court has recognized that where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, "the meaning [of the same words] well may vary to meet the purposes of the law." *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). In all events, Section 924(d)'s treatment of "receipt" as a

type of use makes clear how those two terms interrelate in the relevant context.

C. Construing The Statute To Proscribe Receiving A Firearm In Exchange For Drugs Is Consistent With The Fundamental Purpose Of The Statute

Consideration of Congress's purpose in enacting Section 924(c)(1) confirms that the statute punishes the act of taking a firearm in exchange for illegal drugs.

1. This Court has described "the statute's basic purpose broadly, as an effort to combat the 'dangerous combination' of 'drugs and guns.'" *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998) (quoting *Smith*, 508 U.S. at 240). Proscribing the barter of drugs for guns fits well within the core purpose of the statute. As the *Smith* Court observed, "[t]he fact that a gun is treated momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon." *Smith*, 508 U.S. at 240. "That is so whether the defendant transfers or receives the gun." *Cotto*, 456 F.3d at 29.

By introducing the firearm into the transaction, petitioner caused the very harm that Congress sought to avoid in enacting Section 924(c)(1). It was petitioner, a convicted drug dealer, who initiated the request for a firearm. Pet. App. 9a. He then agreed to provide the required drugs for the purchase of that firearm. *Ibid.* As this Court observed in *Smith*, "[w]hether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society." 508 U.S.

at 239 (quoting *United States* v. *Harris*, 959 F.3d 246, 262 (D.C. Cir. 1992)).

Petitioner suggests that the danger to society perceived by *Smith* was only that the particular individual "who brought the weapon with him[] for use as 'currency'" might convert it to use as a weapon, Pet. Br. 4, and that any such danger is "almost entirely absent" when an individual comes to a drug transaction to trade for a gun, *id.* at 15. That suggestion is unfounded. The *Smith* Court saw no reason why Congress would have intended courts and juries applying Section 924(c) "to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity." *Smith*, 508 U.S. at 240. There is likewise no reason to suppose Congress would have "intended to draw [an even finer] distinction between bartering with a firearm and bartering for a firearm." *Cotto*, 456 F.3d at 30. The danger to society is created not only by the person who brings the firearm to the drug transaction, but also by the drug dealer who takes the weapon in exchange for his drugs during the transaction. "An armed drug dealer is far more dangerous than one who is unarmed," *Phelps*, 895 F.2d at 1286 (Kozinski, J., dissenting from denial of rehearing en banc), and "[t]here are any number of not implausible scenarios where the [gun] could have been used to injure or kill somebody," *id.* at 1288.

Petitioner similarly errs in contending (Br. 24-25) that the statute's purpose is not implicated by his conduct because the statute was intended to "persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff). "From the perspective of any such

purpose (persuading a criminal 'to leave his gun at home')," it would make no sense for Congress to penalize one who brings a gun to trade for drugs but ignores the drug dealer who takes a gun from that person as an integral part of his drug deal. See *Muscarello*, 524 U.S. at 132-133. That is particularly true where the drug dealer, as here, affirmatively sought the firearm.

Moreover, contrary to petitioner's suggestion (Br. 15), the meaning of the statute does not turn on whether any particular defendant's arrest for violating Section 924(c)(1) results from a government undercover operation, or whether a firearm involved in a bartering transaction may be unloaded. Both *Smith* and *Bailey* make clear that a gun need not be discharged to be used, and use of a firearm as an item of barter does not require that a firearm be loaded. In any event, the recipient of an unloaded firearm could load it during the transaction in which it is received. It is the presence of the firearm at the drug transaction that constitutes a danger. The display of a firearm, whether loaded or unloaded, can instill fear in others and "creates an immediate danger that a violent response will ensue." *McLaughlin* v. *United States*, 476 U.S. 16, 17-18 (1986) (holding that an unloaded firearm is a "dangerous weapon" within the meaning of the federal bank robbery statute, 18 U.S.C. 2113(d)). Given the dangerous nature of guns generally, "the law reasonably may presume that such an article is *always* dangerous even though it may not be armed at a particular time or place." *Id.* at 17 (emphasis added).

Nor should the meaning of Section 924(c)(1) be "modified to forbid entrapment-like behavior that falls outside the bounds of current entrapment law." *United States* v. *Jimenez Recio*, 537 U.S. 270, 276 (2003). See Br. 15, 42. If a Section 924(c)(1) prosecution results

from a sting operation, a defendant may be able to raise an entrapment defense—if there was both government inducement and a lack of predisposition on his part to commit the offense. See *Jacobson* v. *United States*, 503 U.S. 540, 548-549 (1992); *Sorrells* v. *United States*, 287 U.S. 435, 442-445 (1932). But the statute should not be distorted to give all defendants—including those not caught in a sting—greater protection. And petitioner, who pleaded guilty, could not reasonably have advanced any entrapment issues here, given his affirmative request for the firearm and his admitted ongoing illegal sales of controlled substances. See Pet. App. 9a-11a.[6]

2. Petitioner suggests (Br. 22-23) that upholding his conviction would "contravene the import" of the 1998 amendment to Section 924(c)(1). In that amendment,

---

[6] Indeed, the law would generally permit a defendant who receives a firearm in trade to be held liable for the introduction of a dangerous weapon into the transaction by his trading partner. Although the government did not seek to impose liability on petitioner under an aiding and abetting theory, the government generally could (at least where the individual who supplies the drugs is not a government agent) "charge the party receiving the gun with aiding and abetting the party supplying it." *Westmoreland*, 122 F.3d at 436 n.1. See *United States* v. *Price*, 76 F.3d 526, 529 (3d Cir. 1996) (explaining that aiding and abetting liability under 18 U.S.C. 2 applies to a charge of using or carrying a firearm under Section 924(c)) (collecting cases); *United States* v. *Long*, 905 F.2d 1572, 1576-1577 n.8 (D.C. Cir.) (Thomas, J.) (observing that, "where the government proves that a defendant has aided or abetted another person's 'use' of a firearm, the defendant may be punished as a principal regardless of whether the defendant himself has actually or constructively possessed the firearm"), cert. denied, 498 U.S. 948 (1990); see also *United States* v. *Hornaday*, 392 F.3d 1306, 1311-1314 (11th Cir. 2004) (discussing possible liability for aiding and abetting under 18 U.S.C. 2 for causing a government agent to do an act that would have been criminal if performed by the defendant), cert. denied, 545 U.S. 1134 (2005).

Congress extended the reach of Section 924(c)(1) to prohibit not only the use or carrying of a firearm during and in relation to a drug trafficking crime, but also the possession of a firearm "in furtherance of any * * * drug trafficking crime." See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469. Even if that amendment were entitled to any weight in interpreting earlier-enacted portions of Section 924(c)(1) (but see, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-188 (1994)), nothing about the amendment is inconsistent with construing "use[]" of a firearm "during and in relation to any * * * drug trafficking crime" to encompass petitioner's conduct.

The 1998 amendment responded to this Court's decision in *Bailey*, which construed the "use" provision in Section 924(c)(1) to require "active employment" of a firearm. The purpose of the amendment was to "revers[e] the restrictive effect of the *Bailey* decision," by proscribing possession of a firearm that, while not sufficiently active to fall within *Bailey*'s definition of "use," nevertheless furthered a drug trafficking crime. H.R. Rep. No. 344, 105th Cong., 1st Sess. 6 (1997). The amendment is an alternative means by which a defendant can violate Section 924(c)(1), under which the government does not have to establish proof of "use[]." Congress based the amendment on the understanding that "[t]he word 'possession' has a broader meaning than either 'uses' or 'carries.'" *Ibid.*; 144 Cong. Rec. 26,608 (1998) (statement of Sen. DeWine) (observing that *Bailey* "severely restricted" Section 924(c) prosecutions and that the amendment was an effort to "restore this crime fighting tool").

Although a drug dealer who takes a firearm in exchange for his drugs generally will be subject to prosecution and punishment under the 1998 amendment, that amendment does not suggest that Congress believed such conduct otherwise escaped punishment under the statute. The 1998 amendment applies to a wide variety of fact patterns other than receipt of a weapon in trade, and the legislative history of the amendment indicates Congress was principally concerned with guns possessed in circumstances akin to those presented in *Bailey*. See, *e.g.*, 144 Cong. Rec. at 26,608-26,609 (statement of Sen. DeWine) (noting that the amendment is "meant to embrace" the situation "where a defendant kept a firearm available to provide security for the transaction, its fruit or proceeds, or was otherwise emboldened by its presence in the commission of the offense"). Moreover, nothing in the legislative history of the 1998 amendment reflects any specific congressional attention to Section 924(c)(1) offenses involving the bartering of a firearm.

To the contrary, Congress had no need to address bartering. Congress sought to overturn the result in *Bailey*, not *Smith*. *Smith* had construed the "use" provision of Section 924(c)(1) to encompass use of a firearm as an item of barter or commerce, and *Bailey* had reaffirmed that holding. *Bailey*, 516 U.S. at 148 ("our decision today is not inconsistent with *Smith*"). And, as of the time of the 1998 amendment, the majority of lower courts to reach the question had held that it did not matter which side of the bartering transaction the defendant was on: taking a firearm in exchange for drugs constituted "use" of the firearm during and in relation to a drug trafficking crime within the meaning of Section 924(c)(1). See *United States* v. *Ramirez-Rangel*, 103 F.3d 1501, 1506 (9th Cir. 1997); *Ulloa*, 94 F.3d at 955-956

(5th Cir.); *Cannon*, 88 F.3d at 1508-1509 (8th Cir.); *United States* v. *Harris*, 39 F.3d 1262, 1269 (4th Cir. 1994); *Harris*, 959 F.2d at 261-262 (D.C. Cir.), abrogated by *Stewart*, 246 F.3d at 730-732; compare *United States* v. *Woodruff*, 131 F.3d 1238, 1243 (7th Cir.) (concluding that exchanging drugs for a gun violates Section 924(c)(1)'s "use" prohibition), cert. denied, 524 U.S. 956 (1998), with *Westmoreland*, 122 F.3d at 435 (7th Cir.) (concluding that receipt of a gun from a government agent in payment for drugs does not constitute "use" under Section 924(c)(1)).

It is appropriate to presume that Congress was aware of these interpretations of Section 924(c)(1), see, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979), and the 1998 amendment is entirely consistent with these decisions. Moreover, the extension of Section 924(c)(1) to include possession would even more clearly provide an alternative basis for prosecuting when the defendant offers the gun in exchange for drugs as in *Smith*. But even petitioner does not suggest that the amendment overturned the result in *Smith*.

D. Because The Ordinary Tools Of Statutory Construction Make The Meaning Of Section 924(c)(1) Clear, The Rule Of Lenity Has No Application In This Case

Contrary to petitioner's argument (Br. 39-40), the rule of lenity does not apply here. The rule of lenity is "reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith*, 508 U.S. at 239 (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971)) (internal quotation marks omitted). "The simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule, for most statutes are

ambiguous to some degree." *Muscarello*, 524 U.S. at 138. As the Court explained in *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), "[b]ecause the meaning of language is inherently contextual, [the Court has] declined to deem a statute 'ambiguous' for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the government." Instead, the rule of lenity comes into play only when there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation marks and citations omitted).

There is no such grievous ambiguity here. The text of Section 924(c)(1), the language of related provisions in Section 924(d), and the fundamental purpose of the statute all compel the conclusion that an individual, like petitioner, who takes a firearm in order to close an illegal drug deal uses that firearm during and in relation to a drug trafficking crime.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

DEANNE E. MAYNARD
Assistant to the Solicitor General

WILLIAM C. BROWN
Attorney

JUNE 2007

APPENDIX

1. Section 922 of Title 18 of the United States Code provides in pertinent part:

Unlawful acts

(a) It shall be unlawful—

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

* * * * *

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State,

(B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

* * * * *

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

* * * * *

(*l*) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

* * * * *

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

2. Section 924 of Title 18 of the United States Code (2000 & Supp. IV 2004) provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the

provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of

the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: Provided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et

seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same sub-

ject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(*o*) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.